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EXAMINER

CHOI, FRANK I

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PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte DEAN RHOADES

Appeal 2007-1611
Application 09/802,425
Technology Center 1600

Decided: May 28, 2008

Before TONI R. SCHEINER, DONALD E. ADAMS, and LORA M. GREEN,
Administrative Patent Judges.

SCHEINER, *Administrative Patent Judge.*

DECISION ON REQUEST FOR REHEARING

Appellant requests reconsideration (rehearing) of the Board's Decision entered February 26, 2008 affirming the Examiner's rejection of appealed claims 5 and 7 as anticipated by or, in the alternative, as obvious over the prior art.

The request for rehearing is granted.

DISCUSSION

In our Decision, we affirmed the rejection of claims 1-3, 5, 7, and 21-23 under 35 U.S.C. §102(e) as anticipated by or, in the alternative, under 35 U.S.C. § 103 as obvious over Messenger (U.S. Patent 6,290,976 B1, filed April 6, 2000, issued September 18, 2001). Appellant maintains that the affirmance was “a misapprehension with respect to claims 5 and 7” (Req. 1).

During prosecution of the present application, the Affidavit of inventor Dean Rhoades (“Affidavit”) was submitted under the provisions of 37 C.F.R. § 1.131 “to overcome the rejection [over] Messenger” (App. Br. 19). In our Decision, we found that the Affidavit “does not establish reduction to practice of the invention of claim 1 prior to Messenger’s effective filing date, and Messenger is available as prior art” (Decision 17-18). In particular, we found that the Affidavit does not establish reduction to practice of a composition comprising a base comprising at least about twenty three percent moisturizer by weight (as required by claim 1), prior to Messenger’s effective filing date (Decision 16-17).

Claim 5 is an independent claim directed to “[a] composition comprising: a base in the form of a cream . . . and a plurality of particles of corundum suspended in the base having an average particle size from 34 to 124 microns, . . . wherein the plurality of particles of corundum are at least thirty five percent by weight of the composition.” Claim 7 depends from claim 5 and further requires that the composition contain at least one of a vitamin, a mineral, an antioxidant, a cleanser, and an emulsifier.

In his Appeal Brief, Appellant argued “[w]ith respect to the amount of abrasive particles, the Affidavit sets forth a composition including 50 percent

particles, which is at least 35 percent of a composition as set forth in Claims 5, 7 and 23” (App. Br. 21). In the present Request, Appellant argues that the Affidavit “shows claim 5 enjoys an earlier priority date than that of Messenger” (Req. 2), inasmuch as claim 5 does not “suffer the claim 1 limitations ‘a base comprising at least about twenty-three percent by weight in moisturizer’ found not to have been reduced to practice in the Rhoades Declaration” (Req. 2).

Having previously found that the formulation of Exhibit B of the Affidavit “has a cream base and contains 50% aluminum oxide by weight, with a particle size of 120 microns . . . and further contains vitamins and emulsifiers” (Decision 22), we agree with Appellant that “Messenger may be eliminated as prior art to claims 5 and 7 in view of the [Affidavit]” (Req. 2).

Appellant’s request for rehearing is granted and the Examiner’s rejection of claims 5 and 7 under 35 U.S.C. § 102(e) as anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as obvious over Messenger is reversed.

REHEARING GRANTED

Ssc:

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